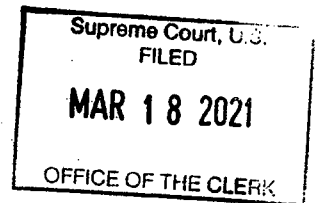


20-7529
No. _____

IN THE
SUPREME COURT OF THE UNITED STATES



Brian Edward Moore — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

District of Columbia Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Brian Edward Moore
(Your Name)

F.C.I Hazelton, P.O. Box 5000
(Address)

Bruceston Mills, WV 26525
(City, State, Zip Code)

FBOP #85695-083
(Phone Number)

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

☒ reported at Mitchell v. United States, 2020 D.C. App. Lexis 313; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☒ reported at United States v. Bishop Fed AppX 216 (5th Cir. 2012); or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☒ reported at Covington v. United States, 698 A.2d 1033 (D.C. Ct. App. 1997); or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the Court of Appeals of Maryland court appears at Appendix _____ to the petition and is

☒ reported at Newman v. State, 384 Md. 285, 863 A.2d 321 (2004); or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was NOV 10 2020.
A copy of that decision appears at Appendix 9.

☒ A timely petition for rehearing was thereafter denied on the following date: JAN 29 2021, and a copy of the order denying rehearing appears at Appendix 10.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

RELATED CASES

- Adams v. Franklin, 924 A.2d 993 (D.C. Ct. Appls. 2007)
- Blunt v. United States, 332 A.2d 579 (D.C. 1974)
- Carrell v. United States, 165 A.3d 314 (D.C. Ct. Appls. 2017) (*en banc*)
- Commonwealth v. Maiden, 61 Mass. App. Ct. 433, 810 N.E. 2d 1279 (2004)
- Covington v. United States, 698 A.2d 1033 (D.C. Ct. Appls. 1997)
- Hawkins v. United States, 119 A.2d 687 (D.C. 2015)
- In re Grand Jury Subpoena, 745 F.3d 681 (3d Cir. 2014)
- In re Pub. Def. Serv., 831 A.2d 890 (D.C. 2003)
- Joiner v. United States, 585 A.2d 176 (D.C. 1991)
- Jones v. United States, 828 A.2d 169 (D.C. 2003)
- McCandless v. Great Atlantic & Pacific Tea Co., 697 F.2d 198, 201-02 (7th Cir. 1983)
- Mitchell v. United States, 2020 D.C. App. Lexis 313
- Newman v. State, 384 Md. 285, 863 A.2d 321 (2004)
- United States v. Baish, 460 A.2d 38 (D.C. 1983)
- United States v. Bishop, 519 Fed. Appx 216 (5th Circuit 2012)
- United States v. Cooper, 115 W.L.R. 1741 (D.C. Super. Ct. 1987)
- United States v. Stanley, 469 F.2d 576, 152 U.S. App. D.C. 170 (1972)
- United States v. Zolin, 491 US 554, 109 S.Ct. 2619 (1989)
- * State v. Boatwright, 54 Kan. App. 2d 433, 401 P.3d 657 (2017)
- * Swindler & Berlin v. United States, 524 US 399, 403 141 Ld 2d 118 S.Ct. 2081 (1998)
- * Upjohn Co. v. United States, 449 US 383, 389, 101 S.Ct. 677, 682 (1981)
- * Purcell v. DA for the Suffolk Dist., 424 Mass. 109, 676 N.E. 2d 436 (1997)

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STATEMENT REGARDING PAGE LIMIT

This writ of certiorari is 28 pages long excluding statements, tables, and addenda required by Rule 33(2)(b).

LIST of ALL PARTIES, INTERVENORS, AMICUS CURIAE, AND
THEIR COUNSEL IN THE TRIAL COURT AND
IN THE APPELLATE PROCEEDING

PARTY	Attorneys & Judges- Superior Court	Counsel- Appeal
Brian E. Moore	John T. Harvey III - Kristin L. McGough	Sean R. Day
United States	Seth M. Gilmore	
Judge (associate)	Honorable Milton C. Lee, Jr.	
Alleged Threats to	D.C. AAG Roseline Guest	

Questions Presented

- I. Are mere statements of intent to commit a crime made in the course of attorney-client representation protected by the attorney-client privilege?
- II. Was there insufficient evidence of threats and obstruction where there was no evidence that the alleged threats were intended to be heard by the alleged victim?
- III. Did the trial court err when it denied the defendant's request for release pending appeal pursuant to D.C. Code § 23-1325(c)?
- IV. Does the Appeal or writ of certiorari raise a substantial question of law or fact likely to result in reversal or an order for a new trial?

List of Parties

All parties appear in the caption of the case on the cover page & above

STATEMENT of THE CASE

It is alleged that on April 12th and June 29th, 2018, during the course of case No. 2017-ccc-000057 (alleged violation of civil protective order) Appellant Moore allegedly made threatening statements to his attorney about the prosecutor. In this case Appellant Moore was charged by indictment with two counts (one pair for each charge) of Obstruction of Justice and Stalking, Threatening, Assaulting and Kidnapping a Government official Family member (Judgement & Commitment order Amended 1 year later ~~on~~ on 7/31/2020).

There was a jury trial before the Honorable Milton C. Lee, Jr., Associate Judge, from May 29-31, 2019. The jury returned guilty Verdicts on all counts. On July 31, 2019, Appellant Moore was sentenced to a total of eight (8) years in Federal Prison as set forth in the chart below. Appellant Moore filed a Notice of Appeal on August 1, 2019.

CHARGE/CONVICTION

Obstruction of Justice April 12 & June 29, 2018

D.C. Code §§ 22-722(a)(5) (Counts 1 & 3)

Threatening a District of Columbia Government official

D.C. Code §§ 22-851(c) April 12 & June 29, 2018 (Counts 2 & 4)

Convictions for each date concurrent to each other and consecutive to charges for other date.

Five (5) years supervised release on Counts one (1) & three (3); one year supervised release on counts two (2) & four (4).

\$100 VVCA per count

Total: 8 years incarceration, 5 years supervised release, \$400 VVCA

TABLE of AUTHORITIES CITED/Statutes & RULES

D.C. Code § 22-861

D.C. Code § 22-851(c)

D.C. Code § 22-722(a)(5)

D.C. Code § 23-1321

D.C. Code § 23-1325

Bail Reform Act, 18 U.S.C 3141

D.C. Rule of Prof. Conduct 1.6

Fed Rule, 18 U.S.C 3143 (Rule 4b)

Maryland Rule of Prof. Conduct 1.6

WIGMORE ON EVIDENCE § 2292

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

Fifth Amendment of the United States Constitution

Sixth Amendment of the United States Constitution

Eighth Amendment of the United States Constitution

Fourteenth Amendment of the United States Constitution

Writ of CERTIORARI

Petitioner respectfully PRAYS that a writ of Certiorari issue to review judgment
Brian E. Moore, Appellant, pro se, hereby request release
pending appeal to Third Party ~~custody~~ custody or Home
Incarceration and/or on the least restrictive terms & conditions.

LEGAL STANDARD

D.C. Code § 23-1325(c). After conviction a person —
shall be detained unless the judicial officer finds by clear and
convincing evidence that (1) the person is not likely to flee or pose
a danger to any other person or to the property of others, and (2) the
appeal or petition for a writ of certiorari raises a substantial
question of law or fact likely to result in a reversal or an order for a
new trial. Upon such findings, the judicial officer shall treat the
person in accordance with the provisions of section 23-1321.

STATUS

To the trial court: Appellant, pro se, filed a Writ of Habeas Corpus
Motion for release conditions pending appeal & stay, filed on
10/28/2019 & DENIED on 11/21/2019 because... "This court does not
have personal jurisdiction over defendant's custodian"...; Appellant's
counsel filed a motion for release conditions pending appeal on 3/24/2020
& DENIED on 9/28/2020 (see ORDER 9/28/2020)
To the D.C. Court of Appeals: ON 7/21/2020, Appellant filed his opening
brief in 19-CF-0687 (appeal from D.C. Superior Court, case # 2018
CF3011411) AND on 7/22/2020, through counsel, Appellant filed motion
for release conditions pending appeal, DENIED on 11/10/2020
... "ORDERED... is dismissed as moot..." (see ORDER NOV 10, 2020)
Appellant, pro se, motion to reconsider release conditions pending
appeal en banc. DENIED on 1/29/2021 (see ORDER Jan 29, 2021)

NOTE: Appellant, through counsel, filed a supplement to the motion on July 22, 2020 from the motion for release pending appeal in the trial court on March 24, 2020. The government filed an opposition on April 20, 2020 in the trial court. (Appellant Counsel, effectively, on 7/22/2020, a "reply" addressing legal arguments that were in the government's opposition). ON 8/19/2020, Appellant filed a second supplement to the motion in the trial court (adding six program certificates "Anger Management, Healthy Relationships, Public Speaking APX (1) APX (2) APX (3) APX (4) APX (5) APX (6) Managing Emotions, Alcoholics Anonymous, and Victim Impact, & two notarized letters from Michael Koleini and Bonita Moore for Appellant APX (7) APX (8) to be in their Third Party Custodian Supervision."

SUMMARY of FACTS

Attorney (CJA) John T. Harvey III was appointed to represent Appellant Brian E. Moore (ultimately against Appellants wishes; see Audio recordings for Appellant opposing counsel for 2017 CCC 000057 & trial counsel demanding Appellant except counsel or get stepped back). In case No. 2017 CCC 000057 Appellant Moore had been charged with NON-violently contacting his wife in violation of a protective order (see selective text messages Appellant was prosecuted on). During the course of that case, Harvey claimed that Moore made threatening statements about the prosecutor in that case D.C. AAG Roseline Guest. (Appellant, Brian E. Moore denies making any of the alleged statements).

PRIVILEGE HEARING

ON 2/25/2019, the trial court (Honorable Craig Iscoe, Associate Judge) held a hearing regarding the applicability of the attorney-client privilege & Affidavit IN Support of An Arrest Warrant (ON 2/5/2021, Appellant, pro se, filed AMICUS CURIAE Supplement To Appellants Brief of Appellant... concerning the A.T.S.O.A.A.W was prejudice).

the court accepted CJA Harveys 10/26/2018, grand jury testimony as true, and also rely on the transcripts and audio from the proceedings in 2017 CCC 000057 on 4/12/2018, 6/29/2018, and 7/2/2018. Judge Craig ISCOE DENIED the IN Limine regarding A.C.P. & A.I.S.D.A.A.W.

In the grand jury proceeding, CJA Harvey testified (without subpoena) that the bench trial in 2017 CCC 000057 was carried over to April 12, 2018, and that Appellant Moore became agitated about Guest (AAG) and with Harvey (CJA). According to Harvey, Moore said "I can't stand this bitch. I hate this bitch. Fuck this bitch." Harvey defended Guest as a prosecutor just doing her job. Moore said "what, are you trying to have sex with her or something?" Harvey repeated that Guest was just doing her job. Moore said, "she keep fucking with me. I'm going to shoot this bitch. I'll fuck this bitch up." (Brief Apx. 91) According to Harvey, Moore said "it" again. (91) Harvey looked at Moore, and testified that Moore said, "Yeah, Harvey. I will fuck this bitch up. I will shoot her ass." Harvey testified that Moore said he had "guns and this and that. He started talking this nonsense." (91) Harvey testified that he told Moore he was taking Moore seriously. Moore said, "You goddamn right I'm serious." (FACT: that is NOT what D.C. AAG Roseline Guest said at the bench on 4/12/2018, NOR at Grand Jury 10/19/2018 & Trial testimony on 5/30/2018)

Harvey testified that he then called Bar Counsel and afterward asked Judge Smith to allow him to withdraw from the case. Judge Smith would NOT allow Harvey to withdraw unless Harvey revealed Moore's statements, which Harvey declined to do at that point. (Brief Apx. 92-93) Harvey testified that he called Bar Counsel again about his options, but Moore approached Harvey and told him "MAN I was just bullshitting. So, you know, let's just leave it alone. Let's just go on

for the trial." (93) Harvey told Moore that if Moore ever did anything like that again, he would believe Moore and disclose it to the court. (93)

The trial continued that afternoon (April 12, 2018) and the next day, but again the case did not finish and was carried over to June 11, 2018. (Brief Apx. 93-94, correct date inserted). On June 6, 2018, Harvey filed for a postponement of the June 11 trial date (due to Harvey's knee surgery) and requested that Moore, who was in North Carolina, caring for his ailing mother on FMLA/Family Sick leave from his employment at DCRA in Washington, D.C., not be required to appear at the resulting June 12 status hearing solely for the purpose of signing a promise to appear for the next court date. (94-95) According to Harvey, Moore did not appear for the June 12 status hearing but did appear at the next date, June 29. (95) (NOTE: 6/12/2018 court was held via telephone; listen to courtsmart audio)

On the late afternoon of Friday, June 29, 2018, the trial court ordered Moore to have an ankle GPS monitor but it was too late to accomplish that day so Moore would have to return to court on Monday, July 2.

(Brief Apx. 25) Harvey and Moore spoke in the hallway. Harvey described Moore as "out of control" and testified that Moore said "Harvey, I'm telling you right now, if I lose my job I'm going to bust a cap in that bitch [quest]." (100) Moore continued, "Fuck that bitch. Fuck that bitch. I'm going to shoot that bitch." (96) Harvey said "Man, what did I tell you about you making that kind of comment to me?" (96) Moore responded, "Fuck that bitch and fuck you, Harvey. I will fucking kill that bitch." (96) -or- "Fuck you. Fuck her. I'm going to bust a cap in that bitch" (Brief Apx. 96) -or- "Fuck you, fuck her, fuck the judge, I'm going to bust a cap in that bitch." (100)

CJA Harvey then went into the courtroom (with Appellant Moore at Appellant Moore's request) and approached the bench without Moore:

Mr. Harvey: I can't represent him. And if you force me to tell you, then I'll just have to tell you this time.

Court: OK, I'm going to direct you to tell me because I've shared with you before —

Mr. Harvey: He's threatening to shoot her. I ain't representing him. We are adversaries but I respect Ms. Guest. I'm not representing that man. He said it again. I cannot represent him. So whatever needs to happen needs to happen but I believe him this time.

[Judge arranges to have someone from U.S. Marshals Service come to the courtroom.]

Mr. Moore: Judge, may I speak?

Court: No sir.

[Judge confirms with deputy marshal that he can take custody of Mr. Moore] (6/29/2018 audio 5:00:20 p.m.) "This portion was omitted from the official transcript but was recovered from the courtroom audio and is part of the record. JUSTICES you may need to rely substantially on courtsmart, courtroom audio, all transcripts from 2017 CCC 000057 D.C. Superior Court case is flawed."

Judge Smith then ordered Moore detained and set the matter in for Monday, July 2, for ascertainment of counsel. The focus on July 2 was whether CJA Harvey could now withdraw from the case. Having consulted with colleagues on the judicial ethics committee, Judge Smith questioned the sincerity of the alleged threats, noting it is not uncommon for disgruntled defendants to threaten an attorney or judge. ("[P]eople make threats all the time to get a judge off the case, to get a prosecutor off a case, to get an attorney off a case". Brief App. 50-51)

Harvey insisted that his relationship with Moore had become toxic.

("The relationship between he and I now has become toxic. Our ability to communicate — my skin starts to boil and so does his." Id. at 55.) After considerable disrespectful exchanges with Judge Smith, Harvey was permitted to withdraw. As of July 2, 2018, AAG Guest supposedly had not heard about the alleged threats and they were not disclosed to her that day. (77-80)

At the privilege hearing in this case, and continuing the same in the order denying the motion for release pending appeal, the trial court analyzed the communications narrowly and in piecemeal fashion; focused on whether the alleged statements were, in isolation, for seeking legal advice; and concluded that Moore was stating what he was going to do, not seeking legal advice. (Brief App. 111) The trial court further concluded that Moore was understandably angry and that his statements were related to his anger, not getting legal advice.

(111) The trial court noted that a single comment might merely be an "ill-advised" yet privileged statement, but that repeating the comments, among other factors, caused them to fall outside the privilege. (113-114)

The trial court found that Appellant Moore poses a flight risk and a danger, relying upon a supposedly "lengthy criminal history which includes violent offenses." Moore's Presentence Investigation Report in this case reveals the following non-traffic convictions, consisting of all misdemeanor offenses and no violent offenses after 1995:

1994 Domestic Assault	2005 obstruction of Justice w/o Force
1995 Resisting Arrest	2006 Failure to Appear
1999 Contempt	2008 Trespass
2004 Contempt	2010 Curse & Abuse
2005 Impeding a Law officer	language offense, Va. Code § 18.2-416

2. 2018 Contempt of Court CPO (sentenced 8/21/2018) (four counts of texting and calling in violation of a Civil Protection Order that was entered by default) NON-Violent

Mr. Moore's criminal history, that's rather remote, does not support the trial court's finding of a "lengthy criminal history which includes violent offense" sufficient to support detention. The trial court further relied upon a "pattern of non-compliance with release conditions". (^{SEE} ORDER p. 6). To the extent there was anything that can be described as a "pattern", which is disputed, there was no such alleged conduct after the court approved Appellant Moore for HISP release. There is no reason for pre-HISP-approval conduct to support detention now, and there has been no subsequent conduct to support a finding that Appellant Moore presents a danger of flight or safety (or that would not be adequately addressed through HISP or other supervised release).

An analysis of the above two concerns of the trial court exposes what was ultimately the trial court's concern: "Defendant's inexcusable actions in this case." (^{SEE} ORDER p. 6). The concern about Appellant Moore's actions in this case collapses the "flight and danger" inquiry into the question of whether the appeal is "likely to result in a reversal or an order for new trial." IF Appellant Moore's convictions are likely to be reversed, they should not be relied upon to hold him as flight or danger risk. "IN *Kleinbart v. United States*, 604 A.2d 861 (D.C. Ct. App. 1991): detention ORDER was vacated because the trial court did not use the clear and convincing evidence standard in determining the defendant posed a risk of flight to satisfy due process, and because the statute equated the detention criteria of "flee or pose a danger" and "risk of flight or danger"; risk of flight cases were governed by the same clear and convincing evidence standard that governed rulings on danger.

OUTCOME: the pretrial detention ORDER was vacated, and the case was remanded with specific instructions to hold new pretrial detention hearing immediately. *TN, United States v. Cooper*, 115 W.L.R. 1741 (D.C. Super. Ct. 1987): defendant's are constitutionally entitled to demand proof by clear and convincing evidence that they are so dangerous that no combination of conditions of release will serve to adequately protect the community and that they must be deprived of their liberty. Federal Rules of 18 U.S.C. § 3143 (Rule 4b: Release for Custody) govern release pending Appeal or Sentencing. The Burden of establishing that the defendant will not flee or pose a danger to any other person or the community rest with the defendant (See: two 3rd Party custodian Notorized letters from Michael Koleini & Bonita Moore AND letters in Appellants Jacket within the communities). Appellant Moore is Not a flight risk NOR poses a danger to any other person or the communities, or to the property of others.

REASONS FOR GRANTING THE PETITION (Writ)

The Appeal Raises a Substantial Question of Law or Fact Likely To Result IN a Reversal or AN order For a New Trial

Appellant Moore's alleged statements to his attorney during the course of his case and relating to the proceeding were privileged. (If he made the statements). The trial court was wrong to apply the attorney-client privilege in a narrow and piecemeal fashion. Other courts have held that in contexts such as this one, the privilege broadly covers attorney-client communications related to the representation, and that either (a) the communication falls within the crime-fraud exception (not applicable here), or (b) it is privileged. There is no third category, or gap.

"The attorney-client privilege is the oldest of the privileges for

confidential communications known to the common law. Its purpose is to

encourage full and frank communications between attorneys and their

clients and thereby promote broader public interests in the observance of

law and administration of justice. Upjohn Co. v. United States, 449

US 383, 389, 101 S.Ct. 677, 682 (1981). The privilege is worthy of "maximum

legal protection." Swindler & Berlin v. United States, 524 US 399, 403

141 L.Ed. 2d 379, 118 S.Ct. 2081 (1998). "The attorney-client privilege is one

of the oldest recognized privileges for communications and privileged

communications are traditionally deemed worthy of maximum legal protection."

In re Rub. Def. Serv., 831 A.2d 890, 900 (D.C. 2003) (internal quotation marks

and citation omitted). It applies to communications related to the purpose

of legal representation. Jones v. United States, 828 A.2d 169, 174 - 75 (D.C. 2003)

(citing Wigmore on Evidence § 2292 formulation of the attorney-client

privilege: (1) where legal advice of any kind is sought (2) from a professional

legal advisor in his capacity as such, (3) the communications relating

to that purpose, (4) made in confidence (5) by the client, (6) are at

his instance permanently protected (7) from disclosure by himself or

by the legal adviser, (8) except the protection be waived.

D.C. Court of Appeals and the Court of Appeals of Maryland have

adopted the Wigmore on Evidence formulation of the privilege. Jones v.

United States, 828 A.2d 169, 175 (D.C. 2003); Newman v. State, 384

Md. 285, 302, 863 A.2d 321, 331 (2004). In Newman, Ms. Newman

was involved in an acrimonious divorce and custody battle. She and a

friend who was assisting her met with Newman's attorney the Friday

before trial. In the lawyer's presence Newman and her friend

discussed plans to kill one of the couple's two children and blame

Newman's husband. Newman told her lawyer, "You know, I don't have

to kill both children. I only need to kill Lars because I can save

Herbie, and then [my husband] will go to jail and get what he deserves

because he is a criminal, and I can at least save Herbie." *Id.* at 291.

The attorney disclosed the communications to the court prior to trial.

In *Newman*, the court held the statements were protected by the attorney-client privilege.

The District of Columbia and Maryland both have rules permitting an attorney to disclose client communications and information to the extent reasonably necessary to prevent an act the attorney believes likely to result in death or substantial bodily harm. D.C. Rule of Prof. Conduct 1.6; Maryland Rule of Prof. Conduct 1.6. Rule 1.6, however, does not set the parameters of the privilege; it simply permits the attorney to disclose the information even though privileged. This distinction and the reasons for it were explained in *Newman*.

The initial step, however, is determining whether the communications falls within the privilege in the first place, and courts have rejected a "piecemeal" approach for deciding what statements during the course of a legal meeting with an attorney are privileged or not; all statements are protected unless fitting the crime-fraud exception. In *Newman*, the court framed it broadly - whether the communications "occurred during the existence of [the] attorney-client relationship" and "were related to the [legal matter]." *Newman*, 384 Md. at 306. Appellant Moore's alleged communications (if appellant Moore made the statements) were firmly within the scope of the attorney-client privilege. The alleged statements were amidst and related to the legal proceedings; specifically, Moore's frustration and exasperation regarding the proceedings, the prosecutor, and his attorney.

Other courts are in alignment with the Court of Appeals of Maryland. In *Purcell v. DA for the Suffolk Dist.*, 424 Mass. 109, 676 N.E. 2d 436 (1997), attorney Purcell was meeting with a client about an order for the client to vacate his apartment and the client threatened to burn

down the building. Purcell advised the authorities, which was permitted to do under the ethical rules. The Supreme Court of Massachusetts decided that the communication did not meet the crime-fraud exception. The court went on to hold that where a client states an intention to commit a crime made to the attorney during the course of representation, it is not a situation where a privilege should be "construed strictly".

Id., 676 N.E. 2d at 441. Either the statement falls within the crime-fraud exception, or it is privileged; there is no third option, or "gap", as the court put it, which would make no sense and frustrate the purposes of the privilege. "A strict construction of the privilege that would leave a gap between the circumstances in which the crime-fraud exception applies and the circumstances in which a communication is protected by the attorney-client privilege would make no sense... UNLESS the crime-fraud exception applies, the attorney-client privilege should apply to communications concerning possible future, as well as past, criminal conduct, because an informed lawyer may be able to dissuade the client from improper future conduct and, if not, under the ethical rules may elect in the public interest to make a limited disclosure of the client's threatened conduct."

In *State v. Boatwright*, 54 Kan. App. 2d 433, 401 P.3d 657 (2017), the appellant threatened to kill his ex-fiancee while discussing a plea offer with his attorney; his attorney told the sheriff's office. The Court held the crime-fraud exception did not apply. The state alternatively argued for a strict construction of the privilege — that the statement was not for the purpose of seeking legal advice. The court firmly rejected such an approach as "piecemealing" attorney-client communications which would undermine the privilege and its purposes. [T]he state's approach to determining if this communication was privileged calls for the piecemealing of attorney-client communications and would fundamentally undermine the attorney-client relationship. *Id.*, 401 P.3d at 664.

Appellant Moore's alleged statements did not meet the crime-fraud-exception

(if appellant Moore made the statements), which has a narrow focus; where

the attorney's advice is sought to commit a crime. "[I]f the crime-fraud

exception... assure[s] that the 'seal of secrecy' between lawyer and

client does not extend to communications 'made for the purpose of

getting advice for the commission of a fraud' or crime." *United States v.*

Zolin, 491 U.S. 554, 563, 109 S.Ct. 2619, 2626 (1989) (citation omitted).

Threats or statements of intent to commit a crime do not fall within

the crime-fraud exception because they are not requests for advice.

"We... join our colleagues on both the federal and state levels who

have required more than a mere statement of the intent to commit a crime

or fraud to trigger the crime-fraud exception to the attorney-client

privilege." *Newman*, 384 Md. at 309 (citing consensus of state and federal

cases, including *In re Pub. Def. Serv.*, 831 A.2d 890 (D.C. 2003), and the

public policy interests stated therein).

D.C. Court of Appeals has recognized the public interests served in

narrowly construing the crime-fraud exception, consistent with the

reasoning of the Court of Appeals of Maryland in *Newman*. For instance,

D.C. Court of Appeals has noted that the crime-fraud exception evaporates

where the attorney talks the client out of the crime. "The crime-fraud

exception does not apply where the attorney talks the client out of

committing the crime or fraud he contemplates or stops the client's

scheme dead in its tracks." *In re Pub. Def. Serv.*, 831 A.2d 890, 895

(D.C. 2003) "Even if the plan is not stopped, merely advising the

client of the criminality of the conduct, if it does not assist the client

in the criminal plan, leaves the privilege intact. *In re Grand Jury*

Subpoena, 745 F.3d 681, 693 (3d Cir. 2014). "By encouraging full &

frank discussions between attorneys and their clients, the attorney-

client privilege promotes broader public interests in the observance

of law and the administration of justice." *Id.* at 900. Assuming that a client is sincerely contemplating killing a prosecutor, is it preferred that the client tell his attorney, who can try to persuade the client otherwise, or is it better that the client just keeps it to himself? "A lawyer's advice... is even more vital when the client misguidedly contemplates or proposes actions that the client knows to be illegal. The existence of the attorney-client privilege encourages clients to make such unguarded and ill-advised suggestions to their lawyers." *In re Pub. Def. Serv.*, 831 A.2d 890, 901 (D.C. 2003). This freedom gives the attorney the opportunity to defer the contemplated course. "[D]iscouraging clients from illegal conduct is a regular occurrence in an attorney's practice. 'About half of the practice of a decent lawyer is telling would-be clients that they are damned fools and should stop.'" *Id.* at 901 (quoting *McCandless v. Great Atlantic & Pacific Tea Co.*, 697 F.2d 198, 201-02 (7th Cir. 1983); quote attributed to Elihu Root). Rule 1.6 does not change the privilege. The privilege frees the client to have free and open communications with his attorney. *Newman*, 384 Md. at 309. The rule of professional conduct frees the attorney to disclose communications to thwart possible criminal activity; simultaneously preserving the privilege allows the attorney to do so without making himself a witness against his client. *Id.*

The trial court believed it significant, at least regarding the June 29 communications, that Mr. Harvey warned Mr. Moore that if he made such comments again, Mr. Harvey would disclose them. (2/25/19 pp. 24-26) Mr. Harvey's disclosures, however, were pursuant to Rule 1.6, which leaves the privilege intact. The privilege belongs to the client, and it was not up to CJA Harvey to determine what was or was not privileged, and whether the privilege would be waived. To hold otherwise would be, as the Court of Appeals of Maryland concluded, "repugnant."

"To permit a Rule 1.6 disclosure to destroy the attorney-client privilege and empower the attorney to essentially waive his client's privilege without the client's consent is repugnant to the entire purpose of the attorney-client privilege in promoting candor between attorney and client. Moreover, it would violate our duty to maintain the integrity of the legal profession." Newman, 384 Md. at 306 (citation and internal quotation marks omitted). D.C. Court of Appeals has recognized in other contexts that Rule 1.6 plays no part in determining the scope of the attorney-client privilege. Adams v. Franklin, 924 A.2d 993, 999 n. 6 (D.C. 2007) ("[T]he rule of evidence [protecting attorney-client privilege] governs admissibility in a trial court; [Rule 1.6], on the other hand, governs only disciplinary actions of the D.C. Bar.") "A lawyer may comply with the final orders or other tribunal of competent jurisdiction requiring the lawyer to give information about the client. BUT a lawyer ordered by a court to disclose client confidences or secrets should NOT comply with the order until the lawyer has personally made every reasonable effort to appeal the order or has notified the client of the order and given the client the opportunity to challenge it. - a court order to compel testimony violates 1.6 - the attorney-client privilege protects ONLY communications from a client to an attorney that are, at the time they are communicated, intended to be confidential." CJA Harvey NEVER made an effort to NOT disclose, NEVER personally made any effort to appeal the order, NEVER notified the client (appellant Moore) of the order & CJA Harvey NOR Judge Judith Smith gave the client (appellant Moore) the opportunity to challenge it (Judge Judith Smith's ORDER), while the appellant stood clueless (to what CJA Harvey disclosed to Judge Judith Smith) in the courtroom. Appellant Moore was not informed of what was communicated at the bench on 6/29/2018 with CJA Harvey & Judge Judith Smith until eight-teen (18) days later in Judge Fern Flannagan's Saddle Creek courtroom.

When Judge Saddler reviewed courtsmart audio (at the request of D.C. AAG Roseline Guest) during bond hearing on 7/17/2018 revealing... "John Harvey told Judge Smith that the defendant said he was gonna kill you and the complainants attorney"... AND Judge Saddler, D.C. Superior Associate Judge, refused to allow CJA Alvin Thomas the opportunity to confront & challenge CJA Harvey. Judge Saddler said "You!!! Neither one of you!!! Can question John Harvey... because he's a constitutional officer of the court"... Violating appellant Moore's Sixth Amendment Confrontation clause. Judge Saddler denied appellant Moore's release conditions. (see courtsmart audio 7/17/2018). Furthermore, between 7/2/2018 & 7/31/2018, CJA John Harvey persistently & personally made every effort to visit U.S. Marshal Defective Bryan Fleck without failure to swear out an Affidavit In Support of An Arrest Warrant on his client, appellant Moore.

Appellant Moore filed "AMICUS CURIAE, Supplement to Appellants Brief of Appellant on Feb 5, 2021 in D.C. Court of Appeals." Appellant Moore was charged on 8/1/2018 with the same identical A.T.S.O.A.A.W (appellant Moore raised on 8/3/2018 with Judge Danya Dayson during arraignment about a copy of the warrant to what your appellant was being charged with. AVSA Seth Gilmore handed appellant Moore a copy of the A.T.S.O.A.A.W & AVSA's Gilmore said to Judge Dayson "it's the same thing Your Honor", Judge Dayson said "are you sure?" to AVSA Gilmore. AVSA Gilmore said, "yes, and it has been proffered.") (See Courtsmart 8/3/2018 arraignment). After the arrest & charge, CJA Harvey went on to the Grand Jury to craft & seal the indictment on "Nov 7, 2018 at 4:12 AM" of two counts of Stalking, Threatening, Assaulting AND Kidnapping a Government Official Family Member & two counts of Obstruction of Justice allegedly on 4/12/2018 & 6/29/2018. (Judgment & Commitment ORDER Amended on 7/31/2020 to Threatening

a Government official & Obstruction of Justice 2X's ON 4/12/2018 & 6/29/2018.) The question of law raised IN LIMINE ON 2/25/2019 was the argument of Attorney-Client Privilege & the Affidavit IN Support of AN Arrest Warrant is prejudiced. Judge Craig Iscoe DENIED the IN LIMINE Motion & release conditions.

The Supplemental Fact in Evidence (A.T.S.O.A.W) & (A.C.P) that CJA Harvey cannot be a witness against his client, appellant Moore, and the A.T.S.O.A.A.W is PREJUDICE, INWHICH became an Evidentiary Fact along with piecemealing the A.C.P. Judge Craig Iscoe allowed CJA Harvey to become the witness against his client, appellant Moore. CJA Harvey is the Evidence & Witness AND the - fruit - of - the - poisonous - tree INWHICH Evidence derived from an illegal... arrest... is inadmissible BECAUSE the Evidence (the "fruit") was tainted by the illegality (the "poisonous tree"). The Supplemental question of Law filed 2/5/2021 to determine whether a mistake of Law or FACT in a District of Columbia Superior Court's judgment, opinion or order or any Material Error of Law was committed when CJA Harvey swore an A.T.S.O.A.A.W on his client to be charged with Threats & Obstruction, D.C. Code §22-861(c) ON 7/31/2018 (See: A.T.S.O.A.A.W) AND utilized R.G. in the Complainant Box instead of his own name, John T. Harvey III, the TRUE Complainant. R.G.'s handler NOR District of Columbia AAG Roseline Guest swore out the A.T.S.O.A.A.W, CJA Harvey did." MOREOVER, the A.T.S.O.A.A.W is FLAWED "§22-861(c)", "dollar sign, 22-861", is crimes against Police Animals statute & subsection(c) does NOT exist in the crimes against Police Animals statute (22-861). The A.T.S.O.A.A.W is a Writ directing or authorizing someone to do an act, esp. one directing a law officer to make an arrest for an arrest warrant issued only on Probable Cause directing a law Enforcement officer to arrest and bring a person to court.

Probable cause is a reasonable ground to suspect that a person has committed or is committing a crime. "Is it a reasonable ground & proper procedure for CJA Harvey to create Probable Cause, swear an A.T.S.O.A.A.W., then execute it on his client appellant Moore?" EXCLUSIONARY RULE; of Evidence. Any rule that excludes or suppresses evidence that does not satisfy a minimum standard of probative value "Courts can exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice (Fed. R. Evidence 403)"; of Criminal Procedure. is a rule that excludes or suppresses evidence obtained in violation of an accused person's constitutional rights. IN, Mapp v. Ohio, 367 US 643 (1961) established that illegally obtained evidence cannot be produced at trial in a state court to substantive criminal charges against a defendant. "The A.T.S.O.A.A.W. was illegally obtained". Criminal Justice Advocate John T. Harvey III, whose primary work is to represent indigent or criminal defendants who cannot afford legal representation, NOT swearing A.T.S.O.A.A.W.'s on his court appointed client(s). IN WHICH, CJA Harvey did swear an A.T.S.O.A.A.W. & is a substantive due process violation, violating appellant's Bill of Rights, and Equal Protection of the Fourteen Amendment of U.S. Constitutional rights that should have NEVER been violated, the provision requiring the states to give similarly situated persons or classes similar treatment under the law.

THE EVIDENCE OF THREATS WAS INSUFFICIENT

For threats, the government must prove that "the defendant's mere need to utter the words as a threat" "with the purpose to threaten or with knowledge that his words would be perceived as a threat." Carrell v. United States, 165 A.3d 314, 317 (D.C. 2017) (en banc). Pre-Carrell, some cases held that the threatening words merely need to "convey a desire" to harm someone and be communicated to anyone. Joiner v. United States, 585 A.2d 176, 179 (D.C. 1991); United States v. Baish,

460 A.2d 38, 42 (D.C. 1983). That loose standard cannot survive Carrell's

reasoning that the accused must intend both the "conduct and the result." Carrell, 165 A.3d at 320. Implicit in Carrell, the government must prove intent for the statement to reach the target. "If is clear

from numerous decisions that the legal definition of a threat requires

'communication' of the threat in the sense that it must be uttered, not

idly, but to the target, to one who the defendant intends to pass it ~~on~~

on to the target, or to one who the defendant should know will probably

pass it on to the target." Commonwealth v. Maiden, 61 Mass. App. Ct.

433, 435, 810 N.E. 2d 1279, 1281 (2004).

The Evidence of obstruction was INSUFFICIENT

obstruction of justice "is a specific intent crime requiring

intent to impair the proceeding." Hawkins v. United States, 119 A.3d

687, 695 (D.C. 2015). There can be no obstruction without a threat

specifically intended to reach Mrs. Guest, which would be necessary

to try to impair the proceeding. A threat communicated to one's

attorney (or anyone else), unless intended for the recipient to

communicate to the target, is no more intentional obstruction of

justice than the thoughts inside one's head. In this case, there

was no evidence that Appellant Moore intended the alleged statements

to reach Mrs. Guest; without such evidence, there was no evidence

that Moore specifically intended to impact guest's actions in

the proceeding.

Absent clear and convincing evidence, D.C. Code § 23-1325(c) requires

the court to apply D.C. Code § 23-1321. The Bail Reform Act, 18 U.S.C. § 3141

et seq. expressly provides that a finding of danger to others or the

community justifying preventing detention shall be supported by clear

and convincing evidence. A court order denying bail or other conditions of release must do more than repeat statutory language and hypothetical risk; it must clearly state the reasons and rationale for holding in jail or prison -- based on regulatory, not punitive concerns. AND, IN United States v. Bishop, 519 Fed. Appx 216 (5th Circuit 2012) "...release should be granted post-convicted review only when the Petitioner has raised substantial constitutional claims upon which he has a high probability of success, and when exceptional circumstances exist which make the grant... of bail necessary...". It is clear, both under the Bail Reform Act, 18 U.S.C. § 3141 et. seq. and under local bail provisions, that money bond may NOT be used to assure detention. Money bond may be set only to guarantee against flight or to assure appearance for trial. In the requisite postconviction findings are made as to flight, dangerousness, and merit on appeal under D.C. Code § 23-1325(b) & (c), the judicial officer(s) shall treat the person in accordance with the provisions of § 23-1321, the pretrial bail sentence which recommends that some conditions of release be set. If surety bond is set under D.C. Code § 23-1321/considerations of dangerousness become irrelevant.

CONCLUSION

~~RELEVANT~~ TRUTHFULLY, NO ONE KNOWS what was said in the

D.C. Superior Court hallway on 6/29/2018 (see sealed bench conference CourtSmart audio for 4/12/2018) but CJA Harvey & Appellant Moore, AND Appellant Moore SOLEMNLY assures you that it was NOT

about D.C. AAG Roseline guest either. Appellant Moore NEVER

threaten D.C. AAG NOR obstructed justice.

The trial court did NOT comply with D.C. Code § 23-1325 & § 23-1321. [The trial court must find that no condition or combination of conditions of release would reasonably assure the safety of members of the community before it may enter an order detaining a defendant. A suitable combination of release conditions would reasonably assure the safety of the members of the community. Third Party custodian is always the first method of release conditions along with a suitable structure to follow so that release conditions may be granted. *Blunt v. United States*, 322 A.2d 579 (D.C. Ct. App. 1974)]

In, *Covington v. United States*, 698 A.2d 1033 (D.C. Ct. App. 1997) the court did NOT consider any combination of conditions will reasonably assure the appearance of the defendant & safety of the community.

REVERSED & ORDERED to set release conditions.

In, *United States v. Stanley*, 469 F.2d 576, 152 U.S. App. D.C. 170, (1972) Bail Reform Act requires release of a convicted defendant pending an appeal unless the appeal is frivolous or a procrastinating maneuver, or unless there is reason to believe that no conditions of release will reasonably assure that he will not flee or pose a danger to another ~~person~~ or to the community.

FACT illuminated, CJA Alvin Thomas (friend & CJA Comrade of CJA John T. Harvey III for years) stated on 7/17/2018 in open court during appellant Moore's detention hearing... "Everybody knows John Harvey will say anything to get off a case" (Review court smart 7/17/2018 D.C. Superior Court Judge Fern Flannagan Saddler)

AND "I asked to withdraw, and if... the only way to get out of the case would be for her to order me to tell her what he said, that I would. She did order me to tell her. AND I did." (5/30/19 p. 184 Trial Transcript). "CJA Harvey outlawed *Adams v. Franklin*, 924 A.2d 993, 999 n. 6 (D.C. Ct. App. 2007)", THEN swore an A.T.S.O.A.A.W directing law enforcement (U.S. Marshals) to charge & arrest his client.

In Mitchell v. United States, 2020 D.C. App. Lexis 313, **Substantial**

Question Requirement should not be read to mean that it is more likely than not that the conviction will be reversed upon appeal as D.C. Code

§ 23-1325(c) was instead satisfied whenever an appellant raises a substantial question of law which, if resolved in their favor, was likely to result in reversal. **HOLDINGS** [1] the order denying defendant's

motion for release pending appeal was reversed because his fourth Amendment claim raised a substantial question of law under D.C. Code

§ 23-1325(c) that was likely to lead to reversal if resolved in his favor as a close question existed as to whether, at the time the officers stopped him, they had a reasonable articulable suspicion that

he had fired the suspected shots; [2] The court clarified it agreed with the unanimous view of the United States Court of Appeals that

the substantial question of requirement should not be read to mean that it is more likely than not that the conviction would be reversed

upon appeal. As to the second prong of D.C. Code § 23-1325(c) was instead satisfied whenever the appellant raises a substantial question of law which, if resolved in appellant's favor, was likely to result in

reversal. **OUTCOME:** ORDER Release, case remanded to trial court for further proceedings. **WHEN** a trial court detects a reversible

error in its own ruling - i.e., one that is more likely than not to result in reversal - it has both the incentive and the ability to

correct that error. Judges generally do not knowingly leave substantial errors uncorrected or deliberately misconstrued

applicable precedent.

Even "if" Appellant Moore made the statements, the attorney-client privilege protects the statements, and Rule 1.6 was supposed

to protect Mr. Harvey (CJA) in disclosing the statements without fear of becoming a witness against his court appointed client.

"CJA Harvey wanted and made it clear to Judge Judith Smith that he was gonna be a witness, as well as his actions of swearing a warrant of arrest on his client Appellant Moore". (see: Courtsmart audio 7/2 & 7/3/2018)

The outcome here, if allowed to stand, would ~~be~~ undermine the attorney-client privilege relationship and an atmosphere of free and open communications.

Appellant Moore, raising substantial Constitutional claims upon which he has a probability of success, and when exceptional circumstances exist, utilizing D.C. Superior Court Rule, D.C. Code § 23-1325(c) demonstrating that Appellant Moore is not likely to flee or pose a danger to any other person or to the property of others AND the Appeal or Petition for a Writ of Certiorari raises a substantial question of law or fact likely to result in a reversal or an order for a New Trial. Upon such findings Appellant Moore ask this Honorable Supreme Court of the United States to treat the in accordance with provisions of section § 23-1321 (c)(1)(B); REMAND for an expedited hearing to be released pending appeal to Third Party Custody, or Home Incarceration, and/or on the least restrictive terms & conditions.

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

(Brian Edward Moore)

Brian E. Moore

Date: 1 March 2021